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SUPREME COURT OF THE STATE  
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MAX B. SPRAGUE and KRISTA SPRAGUE, *Respondents*

v.

SAFECO INSURANCE COMPANY OF AMERICA, *Petitioner*

*Consolidated with*

VISION ONE, LLC and VISION TACOMA, INC., *Petitioners*,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,  
*Respondent*

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**PETITIONER SAFECO INSURANCE COMPANY OF  
AMERICA'S ANSWER TO AMICUS BRIEF OF  
CONSTRUCTION CONTRACTOR INDUSTRY**

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ORIGINAL

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## **I. INTRODUCTION**

The Safeco homeowners policies provide no promise or expectation of coverage for loss resulting from an excluded peril absent a covered cause of loss. Here, there is no dispute that the efficient proximate cause of the Spragues' loss was construction defects. Those defects allowed water intrusion, which caused the Spragues' decks to deteriorate and rot. The Safeco policies at issue exclude physical damage caused directly or indirectly by construction defect, rot, and deterioration. There is no physical damage other than the damage explicitly excluded. There is no covered cause of loss that changes the character of excluded rot.

## **II. STATEMENT OF THE CASE**

The facts and policy language at issue in this matter have been extensively briefed by Safeco both to this Court and to the Court of Appeals. For purposes of Safeco's answer to CCI's amicus brief, the pertinent facts are as follows:

The Spragues' decks have rotted and deteriorated.<sup>1</sup> The efficient proximate cause of the damage to the decks was construction defects.<sup>2</sup> It is undisputed that the decks have not fallen down.

The Safeco policies provide coverage for accidental direct physical loss of the residence premises "... except as limited or excluded."<sup>3</sup> Losses caused directly or indirectly by specifically identified excluded perils, including construction defects, are not covered.<sup>4</sup>

### III. ARGUMENT

**A. Absent direct physical loss by a non-excluded peril, there can be no coverage under the Safeco policies.**

Washington courts construe insurance policies as

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<sup>1</sup> See, e.g., CP 197, at ¶4; CP 217; CP 226. See also CP 106-115; CP 213-34.

<sup>2</sup> See, e.g., CP 316 at lines 19-21 (Spragues acknowledging that the damage to the decks resulted from construction defects, and arguing that the matter hinges on whether collapse is covered). See also Appellants' Reply Brief in *Sprague v. Safeco Ins. Co. of Am.*, Wash. State Court of Appeals Div. I Cause No. 6933-1-I, at 4 ("Defects in the design and construction of the EIFS-stucco cladding on the exterior of the fin walls allowed water to enter and to rot the structural deck piers so severely that they entered a state of imminent collapse."), which is on file with the Court.

<sup>3</sup> See CP 242; CP 268.

<sup>4</sup> See CP 242-61; CP 268-70.

contracts.<sup>5</sup> Each clause in a policy is to be “. . . given force and effect.”<sup>6</sup> The policy is considered as a whole, and given a “fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.”<sup>7</sup> A court will apply the definitions set forth in the policy,<sup>8</sup> but undefined terms are to be given their “plain, ordinary, and popular” meaning as defined in a Standard English dictionary.<sup>9</sup> The Safeco policies provide coverage for “. . . accidental direct physical loss to property in **Building Property We Cover** except as limited

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<sup>5</sup> *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2000) (quoting, *Am. Nat. Fire Ins. Co. v. B&L Trucking & Const. Co.*, 134 Wn.2d 413, 427-28, 951 P.2d 250 (1998) (quoting, *Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 627, 881 P.2d 201(1994))(citations omitted)).

<sup>6</sup> *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 424, 38 P.3d 322 (2002) (citing *Pub. Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 797, 881 P.2d 1020 (1994)).

<sup>7</sup> *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 666, 15 P.3d 115 (2000) (quoting, *Am. Nat. Fire Ins. Co. v. B&L Trucking & Const. Co.*, 134 Wn.2d 413, 427-28, 951 P.2d 250 (1998) (quoting, *Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 627, 881 P.2d 201(1994))(citations omitted)).

<sup>8</sup> *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998).

<sup>9</sup> *Id.* (quoting and citing to *Boeing v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 882, 784 P.2d 507 (1990)).

or excluded.”<sup>10</sup> The policies do not define the term “loss”, so it is appropriate to look to the definitions of this term in a standard dictionary.

The term “loss” is defined as “1: DESTRUCTION, RUIN. . .”<sup>11</sup> Given this definition, the Safeco policies can only reasonably be interpreted to provide coverage for physical injury or destruction because the term “loss” is modified by the phrase “accidental direct physical.” But, the policies do not “. . . cover loss caused directly or indirectly by . . . excluded perils.”<sup>12</sup> The dictionary definition of the term “peril” is, “1: exposure to the risk of being injured, destroyed, or lost: DANGER . . . 2: something that imperils or endangers: RISK . . .”<sup>13</sup> Under the Safeco policies, if one of the enumerated excluded perils directly or indirectly causes the physical injury or destruction there is no coverage.

CCI correctly points out that the Safeco policies do

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<sup>10</sup> See CP 242; CP 268.

<sup>11</sup> MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/loss> (last visited Sept. 1, 2011).

<sup>12</sup> See CP 242; CP 268.

<sup>13</sup> MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/peril> (last visited Sept. 1, 2011).

not name “collapse” as an excluded peril.<sup>14</sup> Unfortunately, it repeats the Court of Appeals’ fundamentally flawed conclusion, stating that loss from collapse is covered in this matter. CCI, like the Court of Appeals, fails to appreciate the key difference between the Safeco policies and other policies that explicitly offer coverage for collapse. Unlike policies that provide coverage for the “*risk of direct physical loss involving collapse*”<sup>15</sup>, the Safeco policies only provide coverage for direct physical damage not for the *risk* of direct physical damage.

There was no direct physical loss (or damage) resulting from collapse, which may have occurred had the Spragues’ decks fallen. Instead, the only direct physical damage was caused by specifically excluded perils. There

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<sup>14</sup> See Amicus Brief of Construction Contractor Industry at 12. It also states that the policies identify “collapse” as a peril but neglects to mention that it is referencing the identification of “collapse” as a peril in the personal property coverages of the policy that do not apply in the matter at hand. *Id.*

<sup>15</sup> See, e.g., *Panorama Vill. Condo. Owners Ass’n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 134, 26 P.3d 910 (2001) (“We will pay for *risk of direct physical loss involving collapse* . . .”) (emphasis added); and *Assurance Co. of Am. v. Wall & Assocs. LLC of Olympia*, 379 F.3d 557, 559 (9<sup>th</sup> Cir. 2004) (“The policy stated that it provided coverage for ‘*[r]isks of direct physical loss or damage* . . .’”) (emphasis added).

can be no coverage regardless of what level the rot and deterioration has reached when there is no additional covered loss.

**B. Under Washington law, and just like the policies at issue in *Acme*, *Weeks*, and *Vision One*, the Safeco policies require the existence of a resulting covered peril for the ensuing loss clauses to be triggered.**

CCI's attempt to distinguish the cases before this Court from *Acme Galvanizing Company, Inc. v. Fireman's Fund Insurance Co.*<sup>16</sup> and *Weeks v. Co-Operative Insurance Cos.*<sup>17</sup> is disingenuous and runs afoul of Washington law. First, and contrary to CCI's argument, there is no functional difference between the ensuing loss clauses in *Acme*, *Weeks*, *Vision One* and this matter.

The ensuing loss clauses at issue in *Weeks* and *Vision One*<sup>18</sup> are virtually identical as are the provisions in *Acme*

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<sup>16</sup> 221 Cal. App. 3d 170, 720 Cal. Rptr. 405 (1990).

<sup>17</sup> 149 N.H. 174, 817 A.2d 292 (N.H. Sup. Ct. 2003).

<sup>18</sup> Compare *Weeks*, 149 N.H. at 174 ("But if an excluded cause of loss that is listed [below] results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss) with *Vision One, LLC v. Phil. Indem. Ins. Co.*, 158 Wn. App. 91, 97, 241 P.3d 429 (2010) ("[if] loss by any of the Covered Causes of Loss results, we will pay for that resulting loss.")

and this matter.<sup>19</sup> While the ensuing loss provisions in *Vision One* and *Weeks* use different words than the Safeco policies or the policy in *Acme*, the end result is necessarily the same. The Safeco policies provide that an "... ensuing loss not excluded or excepted in this policy is covered."<sup>20</sup> And the Safeco policies exclude losses caused directly or indirectly by construction defects. The ensuing loss (rot) is also excluded.

In order for the ensuing loss clause to be triggered, a covered peril necessarily must occur. Otherwise, the only loss was caused directly or indirectly by the specifically excluded peril, which this Court has held is *never covered*.<sup>21</sup> Second, as Safeco has addressed in its supplemental brief, Washington law requires a separate independent covered peril before an ensuing loss clause is

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<sup>19</sup> Compare *Acme*, 221 Cal. App. 3d at 174 ("... unless loss by a peril not otherwise excluded ensues and then the Company shall only be liable for such ensuing loss. . .") with *Sprague v. Safeco Ins. Co. of Am.*, 158 Wn. App. 336, 340, 241 P.3d 1276 (2010) ("However, any ensuing loss not excluded or excepted in this policy is covered.").

<sup>20</sup> *Sprague*, 158 Wn. App. at 340.

<sup>21</sup> See *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 734, 837 P.2d 1000 (1992).

triggered.<sup>22</sup>

By arguing otherwise, CCI ignores *McDonald v. State Farm*,<sup>23</sup> *Port of Seattle v. Lexington Insurance Co.*,<sup>24</sup> and *Wright v. Safeco Insurance Co. of America*.<sup>25</sup> CCI's position does not give effect to all provisions of the policy, and the position it advocates effectively allows the ensuing loss exception to swallow the exclusion; thereby, rendering the Safeco policies' exclusions meaningless.

**C. Construction defects were the efficient proximate cause of the Spragues' loss.**

CCI spends several pages of its brief discussing and arguing matters involving the efficient proximate cause rule and Philadelphia Indemnity Insurance Company's policy language.<sup>26</sup> Efficient proximate cause is not an issue here because there is no dispute that construction defects were the efficient proximate cause of the Spragues' claimed

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<sup>22</sup> See Supplemental Brief of Petitioner Safeco Ins. Co. of Am. at 3-10.

<sup>23</sup> 119 Wn.2d 724, 837 P.2d 1000 (1992).

<sup>24</sup> 111 Wn. App. 901, 48 P.3d 334 (2002).

<sup>25</sup> 124 Wn. App. 263, 109 P.3d 1 (2004).

<sup>26</sup> See Amicus Brief of Construction Contractor Industry at 3-11.

damage.<sup>27</sup> CCI's efficient proximate cause arguments are inapplicable to Safeco's appeal.

**D. CCI's suggestion that Safeco has raised a new issue is inapt.**

CCI argues that Safeco raises a new argument in its Supplemental Brief—specifically, CCI asserts that Safeco proposes a “separate property” test for coverage—and asks this Court not to consider Safeco's new argument.<sup>28</sup> CCI completely misreads Safeco's brief.

In its Supplemental Brief, Safeco notes that Vision One and Amici Building Owners and Managers Association and NAIOP-Washington State Chapter urged the Court to accept a “separate property” test.<sup>29</sup> Safeco itself did not propose such a test. Indeed, Safeco noted that Washington law does not recognize such a test.

Safeco's brief addresses the issue only because it was raised by Vision One and amici in the consolidated case.

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<sup>27</sup> See, e.g., CP 316 at lines 19-21; Appellants' Reply Brief in *Sprague v. Safeco Ins. Co. of Am.*, Wash. State Court of Appeals Div. I Cause No. 6933-1-I, at 4

<sup>28</sup> See Amicus Brief of Construction Contractor Industry at 19-20.

<sup>29</sup> See Supplemental Brief of Petitioner Safeco Ins. Co. of Am. at 12.

Safeco notes that, if this Court were disposed to adopt the test advocated by Vision One and amici, Safeco would nevertheless prevail in this case under that test.

#### IV. CONCLUSION

The Safeco policies cover accidental direct physical loss to property except as otherwise excluded. Damages caused directly or indirectly by excluded perils are not covered, but ensuing losses not otherwise excluded remain covered. The damages to the Spragues' decks were caused by the excluded perils of construction defects, rot, and deterioration. There was no other cause for the claimed damages.

Whether damages caused by a collapse would be covered under the Safeco policies is irrelevant because the peril of collapse *caused no physical damage* to any property. The Court of Appeals erred. To try and overcome this conclusion, CCI offers inaccurate and inapplicable arguments.

Respectfully submitted this 1<sup>st</sup> day of September,  
2011.

**BARRETT & WORDEN, P.S.**

A handwritten signature in cursive script, appearing to read "M. Colleen Barrett", is written over a horizontal line.

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Declaration of Service

I hereby declare under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy the forgoing Petitioner Safeco Insurance Company of America's Answer to Amicus Brief of Construction Contractor Industry via E-mail and/or U.S. Mail on this 1st day of September, 2011, on the following counsel of record:

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